(2)

Supreme Court, U.S.
FILED
FEB 14 2002
OFFICE OF THE CLERK

No. 01-1033

In The

Supreme Court of the United States

ANITA D. BORLAWSKY,

Petitioner,

v.

TOWN OF WINDHAM; MICHAEL R. DENBOW; SCOTT LOSCIUTO; JANETTE LOSCIUTO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION OF RESPONDENT JANETTE LOSCIUTO

BARRI L. BLOOM
Counsel of Record
ANNE H. CRESSEY
RICHARDSON, WHITMAN, LARGE & BADGER
Attorneys for Respondent Janette Losciuto
465 Congress Street
P.O. Box 9545
Portland, ME 04112-9545
207-774-7474

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1698

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit were correct in concluding that Respondent Janette Losciuto acted as a private person and was therefore entitled to summary judgment on the Petitioner's 42 U.S.C. §1983 claim?

2. Whether the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit were correct in concluding that based on the undisputed material facts the Petitioner did not suffer discrimination as a member of a protected class and that Respondents Janette Losciuto and Scott Losciuto were entitled to summary judgment on the Petitioner's federal civil rights conspiracy claim (42 U.S.C. §1985(3))?

3. Whether Federal Rule of Civil Procedure 52(a) requires findings of fact in resolving a motion for summary judgment?

4. Whether the United States District Court for the District of Maine or the United States Court of Appeals for the First Circuit departed from the accepted and usual course of judicial proceedings?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

JANETTE LOSCIUTO'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 3

REASONS FOR DENIAL OF THE WRIT 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) 7

Blum v. Yaretsky, 457 U.S. 991 (1982) 7

Borlawsky v. Town of Windham, 115 F.Supp. 2d 27 (D.Me. 2000) 1, 2

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 9

Burns v. State Police Ass'n, 230 F.3d 8 (1st Cir. 2000) 9

Carpenters v. Scott, 463 U.S. 825 (1983) 9

Griffin v. Breckenridge, 403 U.S. 88 (1971) 9

Lawton v. State Mut. Life Assurance Co., 101 F.3d 218 (1st Cir. 1996) 11

Lefkowitz v. Lider, 443 F.Supp. 352 (D.Mass. 1978) 8

Shelley v. Kraemer, 334 U.S. 1 (1948) 7

Snyder v. Talbot, 836 F.Supp. 19 (D.Me. 1993) 7

STATUTES

42 U.S.C. §1983 ..... 2, 4, 7, 8, 9

42 U.S.C. §1985(3) 2, 4, 9, 10

AUTHORITIES

Federal Rule of Civil Procedure 52 ..... 10, 11

U.S. Const. amend. XIV 7

JANETTE LOSCIUTO'S BRIEF IN OPPOSITION[1]

Respondent Janette Losciuto respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Judgment of the United States Court of Appeals for the First Circuit ("the First Circuit") issued on July 6, 2001 affirming the Order of the United States District Court for the District of Maine ("the District Court") dated September 26, 2000, which are reproduced in the Appendix to the Petition at pages 34 and 23, respectively. The Petitioner has failed to generate an issue worthy of review by this Court and the Court should reject the Petitioner's request.

For Janette Losciuto, as for the Windham Respondents, the federal law claims in this case did not turn on any controversial legal points. The District Court, citing controlling authority, noted that a federal civil rights conspiracy claim can proceed only if the alleged conspiracy is based "upon racial or some other class-based invidious discrimination." *Borlawsky v. Town of Windham*, 115 F.Supp. 2d 27, 29 (D.Me. 2000). Not only did the

---

[1] To the extent that the Petition for Writ of Certiorari raises issues that are common to Janette Losciuto and Officer Denbow and the Town of Windham, Respondent Janette Losciuto joins in the Windham Respondents' arguments and incorporates them by reference. The first paragraph under the heading "Janette Losciuto's Brief in Opposition" is essentially a verbatim restatement of the Windham Respondents' first paragraph. In the remainder of her brief, wherever Respondent Janette Losciuto incorporates an argument or other statement of the Windham Respondents, the relevant passages are footnoted and identified as the original statements and arguments of the Windham Respondents.

Petitioner fail to establish that she was a member of a class needing protection, the only motivation that the court found expressed on the summary judgment record was personal dislike. *Id.* at 29, n.1. The Court gently acknowledged that the complaint was somewhat lacking in clarity[2], but determined that if the Plaintiff intended to press a civil rights claim under 42 U.S.C. §1983 against her former husband and his mother, that claim could not stand because there was no state action. *Id.* at 29. Again, this ruling did not involve a controversial legal issue at all; one of the threshold requirements of any claim for damages under §1983 is that the defendant acted under color of state law, and this requirement has been in §1983 for well over a century.

---

[2] In truth, the complaint was so poorly drafted that even after careful and repeated studying of it neither the parties nor the Magistrate Judge nor the Senior District Judge could ascertain what legal theories were being pled against Scott and Janette Losciuto. There was substantial disagreement on this point in the District Court. The District Court Judge, the Magistrate Judge, and counsel for several of the Defendants expressed frustration with the drafting of the complaint in that legal theories were not clearly articulated and it was at times difficult to determine which claims applied to which Defendants. The complaint uses the word "conspiracy" in Count III, which deals with the Losciutos, but does not cite any particular theory of recovery. Elsewhere in the complaint there is reference to 42 U.S.C. §1983 but it is not clear that that allegation pertains to the Losciutos. In ruling on the summary judgment motions, District Judge Hornby ultimately treated the complaint as including claims against both Janette and Scott Losciuto for deprivation of federal civil rights under §1983 and conspiracy under §1985(3).

The First Circuit, through a panel of three judges, affirmed the District Court's Order based on the reasoning set forth by the District Court Judge. The Circuit Court panel did not deem it necessary to issue a separate opinion, nor did the Court as a whole find any basis for reviewing the panel's decision. While the Petitioner may disagree with these rulings, she has not demonstrated a legitimate reason for the Supreme Court to invoke certiorari review.[3]

STATEMENT OF THE CASE

Anita Borlawsky started this lawsuit in the Superior Court in Cumberland County, Maine in August of 1999 against her former husband, Scott Losciuto; Scott's mother, Janette Losciuto; a Cumberland County deputy sheriff, Joachim Schnupp; Cumberland County; a Windham police officer, Michael Denbow; and the Town of Windham. Ms. Borlawsky, who had lost her temper during an argument on July 30, 1997 with her 13-year old daughter Janelle and hit the girl in the presence of Respondent Janette Losciuto, alleged in her complaint that Scott and Janette Losciuto had maliciously given false information to law enforcement authorities about the incident and had testified falsely in court which led to her losing custody of Janelle and Janelle's younger brother, Joseph.

[3] This paragraph is adopted from the Windham Respondents' Brief in Opposition.

Defendants Schnupp and Cumberland County removed the case to the United States District Court for the District of Maine. On March 31, 2000 the District Court granted the motion of Schnupp and Cumberland County for summary judgment. On September 26, 2000 the District Court entered summary judgment in favor of all remaining Defendants on the federal claims and remanded the state claims to the Superior Court. Anita Borlawsky appealed the September 26, 2000 judgment to the United States Court of Appeals for the First Circuit, which affirmed. Ms. Borlawsky then filed her Petition for Writ of Certiorari. The Respondents are the Defendants whose motions for summary judgment were granted on September 26, 2000: Janette Losciuto, Scott Losciuto, R. Michael Denbow and the Town of Windham.

Pursuant to Supreme Court Rules 15.3, 24.2 and 24.1(g), Respondent Janette Losciuto will briefly recite the facts that are material to the two issues that directly involve this Respondent, *i.e.*, the granting of judgment in favor of Janette Losciuto on the federal civil rights conspiracy claim (42 U.S.C. §1985(3)) and the granting of judgment in favor of Janette Losciuto on the federal civil rights claim (42 U.S.C. §1983).

As the Petitioner points out, the mother and daughter had traveled to Virginia with a clog-dancing group of which Janelle was a member. Petition for Writ of Certiorari at 2. Unfortunately, the trip held some unpleasant surprises for the group, including torrential rains that soaked the costumes during the trip down and a malfunctioning passenger van that caused delays on the trip home. On this point there was direct testimony during

the custody trial from another parent and from one of the other young ladies who went on the ill-fated trip.

Alice Bryant, one of the other chaperones, described the erratic behavior of the Petitioner during the final days of the trip and her hostility towards her daughter, Janelle. Discussing the events of the day when the group left Virginia to begin the trip home, Mrs. Bryant testified that Ms. Borlawsky "lashed out at Janelle. She called her – and excuse me, sir, she called her a 'fucking cunt', followed by 'you fucking bitch'." Transcript of hearing, October 3, 1997, Ninth District Court, Portland, Maine (hereinafter the "Transcript") at 59.[4] Later, at a truck stop in New Jersey, the Petitioner's behavior deteriorated even more:

> [A]ll of a sudden, she came back into the eatery where we were, and she was in a rage. And she told Janelle that she had found a ride to Maine, or Massachusetts, with a trucker, and that Janelle was going to go with her. And at that point, Janelle became very upset and hysterical, and Anita lunged out and grabbed her.

Transcript at 57. *See also* Transcript at 74. Kirsten Gustofsen, a 17-year old clogger who was also on the trip, described the scene as the van carrying Janelle left the truck stop in New Jersey:

> Elise and Janelle came running out very quickly, and Anita was following them, yelling a lot. And we pulled – I pulled Janelle into the car, because she was crying really hard. She was

---

[4] Copies of the relevant pages of the Transcript are in the record as Exhibit 2 to Defendant Janette Losciuto's Statement of Undisputed Material Facts.

> hysterical. And Elise followed and closed the door and locked the doors, and Sally [the driver of the van] came. She wasn't – she hadn't gotten into the van yet, so she was around the front. And Anita came and slammed up against the driver's side window, and . . . yelled that she was gonna kill Elise and Janelle if she ever caught them.

Transcript at 94.

According to the Petitioner, between the time the clogging group returned to Maine and the time she showed up at Respondent Janette Losciuto's house on July 30, 1997, the other members of the clogging group told Janette about what had happened during the last few days of the trip. Plaintiff's Separate Statement of Material Facts dated August 1, 2000, ¶11. It was against this backdrop that Respondent Janette Losciuto witnessed the Petitioner lose her temper and hit her daughter.

REASONS FOR DENIAL OF THE WRIT

I. ON THE UNDISPUTED FACTS OF THIS CASE JANETTE LOSCIUTO WAS NOT A "STATE ACTOR" AT ANY RELEVANT TIME.

Section 1983 of the Civil Rights Act of 1871 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

> and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court has issued scores of opinions interpreting this law since its enactment following the Civil War, and one of the enduring and most obvious requirements for sustaining an action for damages under this statute is the presence of state action:

> To state a claim for relief in an action brought under §1983, [the parties asserting the claim] must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of §1983 excludes from its reach " 'merely private conduct, no matter how discriminatory or wrongful.' "

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). The District Court and the Court of Appeals for the First Circuit both recognized that the Petitioner's claims against Respondents Janette and Scott Losciuto fall far short of meeting the requirements for a successful claim under §1983.

Janette Losciuto is indisputably a private person who cannot be sued under §1983 unless certain other elements are present. *See, e.g., Snyder v. Talbot*, 836 F.Supp. 19, 23 (D.Me. 1993):

> In order to establish that a private individual acted "under color" of law, the Supreme Court has required a showing that the Defendant

> "reached an understanding" with a state officer, . . . or corruptly conspired with a judge through the use of bribery or other means. . . .

Needless to say, there is no evidence whatsoever of any bribery or corruption in this case. *See also Lefkowitz v. Lider*, 443 F.Supp. 352, 357 (D.Mass. 1978):

> Section 1983 safeguards constitutional rights only from infringement by persons acting under color of state or local authority; an allegation of constitutional violations arising from the acts of private citizens, however willful and malicious, does not state a cognizable §1983 claim.

The *Lefkowitz* court rejected the claim that simply by invoking state laws in the course of litigation a private party can be transformed into a state actor. *Id.* at 358 ("Nor does defendants' resort to the judicial process and to the authority of the Commonwealth's statutes transform these private individuals into state agents. . . . ") These principles apply with equal force to a private person who invokes the criminal laws in an attempt to protect herself or another person. Janette Losciuto's decision to call the police to report the Petitioner's hitting of her daughter did not transform Janette into a state actor with the power to deprive another person of constitutional rights.

With respect to the other essential element of a §1983 claim, *i.e.*, the allegation of deprivation of a federal constitutional right, the Petitioner produced no evidence that Janette Losciuto did anything – either alone or in concert with someone else – that deprived Ms. Borlawsky of any constitutional right.

II. THE FACTS OF THIS CASE COMPLETELY FAIL TO MAKE OUT A CLAIM AGAINST RESPONDENT JANETTE LOSCIUTO FOR CONSPIRACY TO DENY THE PETITIONER THE EQUAL PROTECTION OF THE LAWS (42 U.S.C. §1985(3)).

The civil rights conspiracy statute, 42 U.S.C. §1985(3), "confers a private right of action for injuries occasioned when 'two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . . ' " *Burns v. State Police Ass'n*, 230 F.3d 8, 12 n.3 (1st Cir. 2000) (quoting 42 U.S.C. §1985(3)). The elements of a successful claim under this statute are just as clear as the elements of a §1983 claim as discussed above:

> Our precedents establish that in order to prove a private conspiracy in violation of the first clause of §1985(3), a plaintiff must show, inter alia, (1) that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action," *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), and (2) that the conspiracy "aimed at interfering with rights" that are "protected against private, as well as official, encroachment," *Carpenters v. Scott*, 463 U.S. 825, 833 (1983).

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-268 (1993) (parallel citations omitted). As the District Court pointed out, the Petitioner's argument that she is a member of a suspect class, namely divorced or otherwise single mothers, does not satisfy the requirements of §1985(3). The Petitioner has never offered any rationale to

support her bid for recognition of divorced or otherwise single mothers as a suspect classification. Moreover, there is no evidence in this case that any Defendant's conduct toward the Petitioner was motivated by any class-based discriminatory animus. To the contrary, Ms. Borlawsky has always asserted that Janette Losciuto and Scott Losciuto were both motivated by personal dislike of her. *See* District Court's Order on Motions for Summary Judgment at 3, Petition for Writ of Certiorari, Appendix at 25, fn.1. Where the Plaintiff has no support for a claim of discrimination, summary judgment for the Defendant is the appropriate course of action in dealing with a §1985(3) conspiracy claim.

III. FINDINGS OF FACT ARE NOT REQUIRED IN RULINGS ON MOTIONS FOR SUMMARY JUDGMENT.[5]

Federal Rule of Civil Procedure 52(a) specifically states in relevant part that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56." Even if the Petitioner had properly preserved this issue, which she did not, the plain text of Rule 52 contradicts her entire argument.

---

[5] This point of argument is adopted *verbatim* from the Windham Respondents' Brief in Opposition.

IV. THERE WERE NO IRREGULARITIES IN THE PROCEDURES BELOW TO JUSTIFY REVIEW BY THIS COURT.[6]

The Petitioner's omnibus argument concerning the treatment of this case below fails to generate an issue worthy of review by this Court. As discussed above, Federal Rule of Civil Procedure 52(a) does not require *any* findings of fact; therefore, the District Court's refusal to find certain facts cannot be erroneous. The remaining examples of misconduct by the District Court relate to that body's alleged failure to follow governing precedent. As discussed above, to the extent the Petitioner preserved the issues by developing cogent arguments, the District Court applied the correct legal standards. The Petitioner's dissatisfaction with the result is no basis for review by this Court.

The Petitioner's complaints about the First Circuit's conduct do not merit a lengthy response. Suffice it to say the First Circuit had the authority to dispose of the case as it did, *see Lawton v. State Mut. Life Assurance Co.*, 101 F.3d 218, 220 (1st Cir. 1996), and the Petitioner did not present the Circuit Court judges sitting *en banc* with a viable reason to review the panel's determination.

---

[6] This point of argument is adopted *verbatim* from the Windham Respondents' Brief in Opposition.

CONCLUSION

For all of the foregoing reasons, Respondent Janette Losciuto respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BARRI L. BLOOM, ESQ.*
Counsel of Record for Respondent Janette Losciuto

ANNE H. CRESSEY, ESQ.
RICHARDSON, WHITMAN, LARGE & BADGER
465 Congress Street
P.O. Box 9545
Portland, ME 04112-9545
(207) 774-7474

* Application for admission to the bar of the U.S. Supreme Court is pending.